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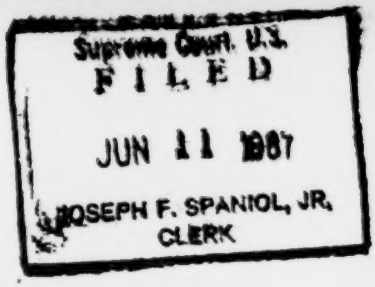

1986-87 TERM

IN THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT NUMBER _____

SAM DRAINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 86-7475)

THOMAS M. HAAS
CHRISTOPHER KNIGHT
255 St. Francis St.
Mobile, Alabama 36602
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Attorneys for Petitioner

45PP

QUESTIONS PRESENTED FOR REVIEW

I. Is prosecution under 21 U.S.C. §848 (engaging in continuing criminal enterprise) unconstitutional as applied to the Petitioner as arbitrary and capricious in contravention of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution where evidence was - that Petitioner possessed no more than one ounce of contraband (marijuana) at the time of his arrest, where Government seized approximately $70,000 in currency which could arguably be connected with the alleged enterprise, and evidence disclosed that Petitioner was essentially a small time operator and not drug overlord or kingpen?

II. Is sentence of Petitioner to twelve year custody sentence under 21 U.S.C. §848 for engaging in continuing criminal enterprise disproportionate to crime charged and cruel and unusual punishment under the Eighth Amendment to the United States Constitution where evidence was that Petitioner possessed no more than one ounce of contraband (marijuana) at the time of his arrest, where Government seized approximately $70,000 in currency which could arguably be connected with alleged enterprise, and evidence disclosed that Petitioner was essentially a small time operator and not drug overlord or kingpen?

LIST OF PARTIES

The parties to this proceeding are the United States of America, the Respondent, and Sam Draine, the Petitioner.

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Legislative History, 1970 U.S. Code Cong. and Admin. News, 4566 at 4648

OPINIONS DELIVERED IN COURTS BELOW

The Petitioner was convicted of violating 21 U.S.C. §848 in a jury trial in the United States District Court for the Southern District of Alabama and sentenced to twelve (12) years in custody. No opinion was delivered by the District Court. His conviction was affirmed by the United States Court of Appeals for the Eleventh Circuit in a per curiam opinion reported at 811 F.2d 1419 (11th Cir. 1987), which is set out in its entirety infra (Appendix, P. A-7).

GROUNDS UPON WHICH SUPREME COURT JURISDICTION IS INVOKED

The decree sought to be reviewed was entered on March 6, 1987, by the United States Court of Appeals for the Eleventh Circuit. The Petitioner did not Petition for Rehearing.

The statutory provision which confers upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1254(1), which permits review by the Supreme Court of cases in the courts of appeals by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, withou due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 U.S.C. §848

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in section 853 of this title.

CONTINUING CRIMINAL ENTERPRISE DEFINED

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violation of this subchapter or subchapter II of this chapter--

(A) which are undertaken by such person in concert with five or more other person with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

SUSPENSION OF SENTENCE AND PROBATION PROHIBITED

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1982 (D.C. code, secs. 24-203 to 24-207), shall not apply.

STATEMENT OF THE CASE

The Petitioner was indicted in a seven-count indictment charging violation of 21 U.S.C. §848 (Count 1), 21 U.S.C. §846 (Counts 2 and 7), and 21 U.S.C. §841 (Counts 3 through 6). He was convicted in the United States District Court for the Southern

District of Alabama of the 21 U.S.C. §848 violation and sentenced to twelve (12) years in custody and received a concurrent three (3) year custody sentence on the remaining counts. He appealed his 21 U.S.C. §848 conviction, inter alia, on the grounds that 21 U.S.C. §848 is unconstitutional as applied to him as being arbitrary and capricious in violation of the Fourteenth Amendment, and as being cruel and unusual punishment in violation of the Eighth Amendment. The United States Court of Appeals for the Eleventh Circuit affirmed his conviction in a per curiam opinion.

The Government case established that Sam Draine owned three houses in the Mobile, Alabama, area, out of which he had supervised a "nickel bag" marijuana sale operation. The

evidence fairly established that Draine supervised four (4) individuals, Geraldine West, (R2-32), Betty Jean Pettway (R2-74), Sonny Draine (R2-36), and Tom Ivory (R2-57-171), in his marijuana sale operation. The Petitioner disputed whether the evidence established beyond a reasonable doubt the supervision of other individuals, but the Court of Appeals found ample evidence to support the "five person" requirement of 21 U.S.C. §848, concluding that a reasonable jury could find beyond a reasonable doubt that Edward Bodden acted in concert with Draine. 811 F.2d 1419 (11th Cir. 1987).

FBI agents recovered $16,200.00 in United States currency from one of Draine's houses (R3-428), $16,758.00 in his safety deposit box at one bank, $41,550.00 in another safe deposit

box at a second bank, and $18,000.00, $188.00, and $479.00, respectively, in other locations. (R3-428, R3-485, R3-508). A total of 20.3 grams of marijuana was seized for the entire operation. (R2-214-255). The undercover agents making the buys at the three houses operated by Draine used marked $20.00 bills to make the buys. Three (3) of these marked bills were recovered in the defendant's safe deposit box.

Officer Terry Hicks of the Mobile Police Department filmed sixty-seven (67) buys at one of the locations. (R3-342). The evidence revealed that between August 2, 1984, and November 25, 1984, the Defendant's deposits exceeded $100,000.00 in currency. (R3-405, 406). No other source of this currency other than the drug

operation was disclosed. However, the Government produced no proof that the drug operation was the only source of the currency recovered from the Defendant's safe deposit boxes.

ARGUMENT

I.

The prosecution of this defendant under 21 U.S.C. § 848 was arbitrary and capricious, and a violation of due process, there being insufficient evidence to support a conviction under this statute. Congress did not intend to punish small time operators under this statute. Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). Moreover, the legislative history of the statute indicates that Congress had much concern about the application of this section to a fact situation such as the one before the Court:

> ". . . candor requires that it be pointed out that this section still contains serious objections... They are as follows:
>
> (1)(b) It is not at all clear

what is meant by deriving "substantial income or resources from the enterprise. . .

(2) The very severe penalty of the continuing criminal enterprise section is applicable to a broad range of criminal activities, some of which are very mild and some of which are very serious, without discrimination.

(3) The mandating of a minimum penalty upon the Court presents the dilemma of:

(a) Holding a person guilty of a minor or moderate crime not guilty to avoid the inordinate sentence of ten years, or

(b) Imposing a ten year sentence upon one who is not guilty of a serious crime, not likely to be a repeater and whose life may be ruined by the conviction."

Legislative History, 1970, U.S. Code Cong. and Admin. News, 4566 at 4648.

This defendant had essentially a "nickel bag operation" in which individuals would purchase small amounts of marijuana one nickel bag at a time. This operation was a local one and

analagous in scope to a "whiskey shot house" where individuals would purchase one shot of alcohol at a time. In light of the relatively small amount of contraband involved (20.3 grams total seized from all three houses) and the relatively small amount of contraband which could arguably have been dealt (a total of $100,000 over a four month period in receipts could have been netted from the sale of no more than 50 pounds or 20,000 $5.00 envelopes.)). Moreover, only approximately $74,000 was seized from all locations which the defendant operated and from his safe deposit boxes, not all of which was definitely connected with his marijuana sale operation.

The amount of contraband and the amount of resources realized from this operation both pale in comparison to the

amounts seized in a thorough sampling of other cases prosecuted under this section. United States v. Graziano, 710 F.2d 699 (11th Cir. 1983) (attempted importation of 40,000 pounds of marijuana, 60,000 to 80,000 pounds of marijuana and 4,800 pounds of marijuana on different occasions); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986) (Importation of several kilograms of cocaine on one occasion and over 1,000 pounds of cocaine on another, the total mount of currency involved exceeding $1,000,000); United States v. Phillips, 694 F.2d 971 (5th Cir. Unit B 1981), cert. denied sub nom., Meinster v. United States, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982) (3,800 and 6,000 pounds of marijuana seized on two occasions); United States v. Dickey, 736 F.2d 571 (10th

Cir. 1984) (payment of one conspirator to another of over $500,000 in one year coupled with evidence that the defendant spent large sums of money, in cash for various personal items such as jewelry, automobiles, real estate, and a swimming pool); United States v. Manfredi, 488 F.2d 588 (2nd Cir. 1973) (a family narcotics business was involved in the sale of millions of dollars in heroin and cocaine by using 17 sellers to sell to approximately 50 addicts); United States v. Pisca, 503 F.2d 1337 (2nd Cir. 1974) ($5,000,000 per year corporate style enterprise which distributed 200 kilograms of heroin annually); United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974) (a case of a well organized and highly profitable conspiracy involving kilo and multi-kilo quantities of cocaine

and heroin); Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) (excess of $1,000,000 in profit realized on sale one to two-thousand capsules of heroin a day). This sampling of cases among the circuits reveals that the activity in this case was not the volume of activity which Congress sought to prohibit in enacting 21 U.S.C. § 848.

This Court has frequently held that it is a violation of due process for a criminal defendant to be convicted and punished on evidence which failed to prove his guilt. Adderly v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 707 (1961); Thompson v. Louisville, 362

U.S. 100, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

There was inadequate proof of Draine's guilt of violation of 21 U.S.C. § 848 in this case to withstand scrutiny under the due process clauses of the Fifth and Fourteenth Amendments.

II.

The sentence of this defendant to twelve (12) years in custody for violation of 21 U.S.C. § 848 in this case is cruel and unusual punishment under the Eighth Amendment. In applying the Court's mandated proportionality analysis to a particular sentence, as required by Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), a court must look to three factors: (1) the gravity of the offense and harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions.

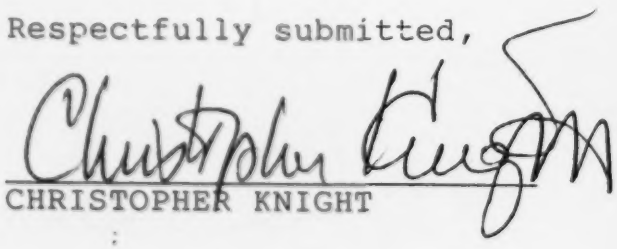
Applying the facts of this case to the law handed down in Solem, this defendant's sentence constitutes cruel

and unusual punishment. As argued herein in Issue I, the evidence was insufficient to prove that this defendant engaged in a continuing criminal enterprise which Congress sought to prohibit in enacting the statute. The gravity of this offense does not rise to the level of those cases cited herein in Issue I, which constitute a representative sampling of continuing criminal enterprise cases in the various federal circuits. This defendant operated on a local level, and his operation was analogous to a "whiskey shot house" type of operation.

The five-year sentence imposed by the Court in this case for violation of 21 U.S.C. § 841 was certainly ample and appropriate for a crime the nature of which this defendant committed.

Congress did not intend that small time operators such as this defendant be punished to the extent received by this defendant. Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). Because the harshness of the penalty in this case does not fit the severity of the crime, this defendant received cruel and unusual punishment in violation of the Eighth Amendment.

Respectfully submitted,



CHRISTOPHER KNIGHT

CERTIFICATE OF SERVICE

I, Christopher Knight, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari on the Honorable Edwin Meese, Attorney General of the United States, by depositing same in the United States mail, properly addressed and first class postage prepaid on this the 9th day of June, 1987.

Christopher Knight

CHRISTOPHER KNIGHT

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA vs. SAM DRAINE,

Docket No. 85-00178-H

JUDGMENT AND PROBATION/COMMITMENT ORDER:

In the presence of the attorney for the government the defendant appeared in person on this date, June 25, 1986, with counsel, William A. Kimbrough

PLEA: Not Guilty

FINDING & JUDGMENT

There being a verdict of GUILTY. Defendant has been convicted as charged of the offense of violation of section 848 of Title 21, and d846 of Title 21, and 841(a)(1) of Title 21, and section 2 of Tile 18, as charged in counts one through six of the indictment. (count seven of the indictment dismissed). U.S. District Court. Sou.

Dis. Ala. filed and entered this the 25th day of June, 1986, Judgment Min. entry NO. 3622-A JOHN V. O'BRIEN, CLERK By: C,.Burton, DEPUTY CLERK.

SENTENCE OR PROBATION ORDER:

SPECIAL CONDITIONS OF PROBATION:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment as follows:

Under Counts 1 and 2 (which are merged): for a period of 12 years.

Under Count 3: for a period of 3 years, to run concurrent with Counts

1 and 2; a 2 year special parole term.

Under Count 4: for a period of 3 years, to run concurrent with Counts 1 and 2; a 2 year special parole term, to run concurrent with the special parole term in Count 3.

Under Count 5: for a period of 3 years, to run concurrent with Counts 1 and 2; a 2 year special parole term, to run concurrent with the special parole term in Count 3; a special monetary assessment of $50.00.

Under Count 6: for a period of 3 years, to run concurrent with Counts 1 and 2; a 2 year special parole term, to run concurrent with the special parole term in Count 3; a special monetary assessment of $50.00.

In summary, the Defendant will serve twelve (12) years imprisonment

with a special parole term of two (2) years and a special monetary assessment of $100.00

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

The court orders commitment to the custody of the Attorney General and orders that the defendant shall receive credit for the time detained in Federal Custody prior to his being released on bond. Also, the Court ORDERS that the Defendant shall voluntarily report to the institution designated by the United States Marshal on or before 12:00 noon on July 22, 1986.

original signed
C. Roger Vinson
U.S. District Judge
Date June 25, 1986

UNITED STATES of America,
Plaintiff-Appellee,

v.

SAM DRAINE,
Defendant-Appellant,

No. 86-7475
Non Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

March 6, 1987.

Before GODBOLD, VANCE and JOHNSON,
Circuit Judges

PER CURIAM:

Appellant Sam Draine was indicted for engaging in a continuing criminal enterprise in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One), conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) Count Two, unlawful distribution and possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (Counts Three-Six),

and attempting to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846 (Count Seven). The government charged that Draine organized and managed the sale of marijuana from houses that he owned. Defendant was convicted by the jury on all counts except Count Seven. Draine now appeals.

(1) Draine attacks the sufficiency of the evidence supporting his conviction for engaging in a continuing criminal enterprise charge, the government must establish that the defendant engaged in a continuing series of felony violations of the federal narcotics laws in concert with five or more persons under his management or supervision, and that he obtained substantial income or resources from this conduct. United States v. Chagra, 669 F.2d 241, 256 (5th Cir.) cert. denied 459 U.S. 846,

103 S.Ct. 102, 74 L.Ed.2d 92 (1982); United States v. Phillips, 664 F.2d 971, 1012-1013 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); United States v. Michel, 588 F.2d 986, 1000 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979).

(2) Appellant concedes that he acted in concert with four individuals; West, Pettaway, Ivory and his brother Johnny Draine. He argues, however, that the government did not meet its burden of showing that Draine acted in concert with a fifth person. This claim is contradicted by the record. At trial, Edward Bodden testified that he knew that West worked at Draine's house on Bay Avenue selling the suspicious "stuff in the brown envelopes." Bodden admitted delivering the money

from West's sales to Draine. Bodden also testified that, at Draine's request, he delivered packages of what he thought to be marijuana to the Bay Avenue house. Officer Terry Hicks identified Bodden as one of the individuals he saw enter the Bay Avenue house during his surveillance. He stated that Bodden left carrying a sack from the house. Betty Jean Pettaway also tstified that a man named Edward who had a foreign accent delivered marijuana to the house for her to sell and picked up money to deliver back to Draine. Appellant is correct that Bodden would not admit to participating knowingly in illegal activity. Nonetheless, viewing the evidence in the light most favorable to the government, we conclude that a reasonable jury could find beyond a reasonable doubt that Bodden acted

in concert with Draine in the drug operation. See United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

(3) Appellant also asserts that the government failed to establish that he realized "substantial income or resources" from his operation of a continuing criminal enterprise. The government may prove that Draine obtained substantial income or resources by direct or circumstantial evidence. See United States v. Phillips, 664 F.2d 971, 1035(5th Cir. 1981) 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Here, a number of government witnesses testified that Draine frequently received deliveries of the cash proceeds from drug sales and that these

cash deliveries ranged in amount from several hundred to thousands of dollars. Bank records also showed that Draine exchanged $105,000 in small bills from July through November 1984 with some of the bills directly traceable to drug buys by Officer Hicks at the Bay Street house. Searches of Draine's safe deposit boxes and houses yielded over $70,000 in cash. In addition, Draine held title to three parcels of Mobile real estate. This evidence, taken together, is sufficient to support the jury's conclusion that appellant obtained substantial income or resources from his operation of a continuing criminal enterprise. See United States v. Chagra, 669 F.2d 241, 256-58 (5th Cir.), cert. denied, 459 U.S. 846, 103 S.Ct. 102, 74 L.Ed.2d 92 (1982); United States v. Phillips, 664 F.2d

971, 1035 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed2d 1354 (1982); United States v. Bolts, 558 F.2d 316, 321 (5th Cir. 1977), cert. denied, 439 U.S. 898, 99 S.Ct. 262, 58 L.Ed.2d246 (1978).

(4,5) Draine further complains that the trial court erred in denying his motion for a bill of particulars. The denial of a bill of particulars rests within the sound discretion of the trial court, and can be reversed only when it is established that defendant was actually surprised at trial and thus incurred prejudice to his substantial rights. United States v. Hawkins, 661 F.2d 436, 451-52 (5th cir. 1981), cert. denied, 456 U.S. 991, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982) (and cases cited therein). While the indictment in this case could have

been more specific, it did list Draine's co-defendants and gave him notice of the elements of the charged offense. The government also identified potential witnesses and provided the co-defendants' statements during pretrial discovery. The record also shows that Draine's counsel capably and extensively cross-examined the government's witnesses at trial. Draine can point to no instance where he was unfairly surprised. We thus conclude that the appellant has not shown the prejudice necessary for reversible error. See, e.g., United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980); United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

Lastly, Draine contends that 21 U.S.C. § 848 is unconstitutional as applied to this defendant. This claim is wholly without merit. This court cannot consider the head of a drug ring involving a number of houses and tens of thousands of dollars to be "a small time operator." Rather, it was just such substantial operations that we believe Congress intended to prosecute, punish and deter in passing 21 U.S.C. § 848.

AFFIRMED.